

ARTICLE 12.1 PUBLIC RECORDS; CONFIDENTIAL INFORMATION; CONFIDENTIALITY AGREEMENTS

RULE 1. PURPOSE AND APPLICABILITY

327 IAC 12.1-1-1 --- Public records law: purpose

The purpose of this article is to provide the following:

- (1) The policy of the board, to be followed by the department, in making public records available for public review and copying in accordance with IC 5-14-3 unless the information is determined to be confidential.
- (2) The provisions for protecting legitimate interests in the confidentiality of certain information.
- (3) The criteria to be used for determining the legitimacy of confidentiality claims in accordance with IC 5-14-3.
- (4) The procedures that the commissioner shall use in making determinations on the confidentiality of information.
- (5) The form of confidentiality agreements required by IC 13-14-11-5 from employees of the department and from persons under contract to the department.

[As added at: 23 IR 1631.]

327 IAC 12.1-1-2 --- Public records law: applicability

This article applies to the following:

- (1) Information received on or after the effective date of this article from a person requesting confidential treatment of that information. The information may be either:
 - (A) treated as a single unit of information even if the information is comprised of a collection of individual items of information; or
 - (B) separated into two (2) or more categories to afford different treatment to the information in each category because the claim covers only a portion of the information.
- (2) Employees of the department and contractors who:
 - (A) make the confidentiality determination;
 - (B) handle the confidential information; or
 - (C) maintain the file of confidential information.

[As added at: 23 IR 1631.]

RULE 2. DEFINITIONS

327 IAC 12.1-2-1 --- Public records law: definitions

The definitions in this rule apply throughout this article.

[As added at: 23 IR 1631.]

327 IAC 12.1-2-2 --- Definitions: “available to the public” defined

“Available to the public” means a public record, as defined by IC 5-14-3, but excluding public records described in 327 IAC 12.1-3-1(b), that the department shall furnish to any member of the public upon request, or may otherwise make public.

[As added at: 23 IR 1631.]

327 IAC 12.1-2-3 --- Definitions: “board” defined

“Board” means the water pollution control board.

[As added at: 23 IR 1631.]

327 IAC 12.1-2-4 --- Definitions: “claim of confidentiality” or “claim” defined

“Claim of confidentiality” or “claim” means a claim or assertion that information be treated as confidential because the information is excepted from disclosure under IC 5-14-3-4(a) or IC 5-14-3-4(b).

[As added at: 23 IR 1631.]

327 IAC 12.1-2-5 --- Definitions: “commissioner” defined

“Commissioner” means the commissioner of the department.

[As added at: 23 IR 1631.]

327 IAC 12.1-2-6 --- Definitions: “contaminant” defined

“Contaminant” means any physical, chemical, biological, or radiological substance or matter in water.

[As added at: 23 IR 1631.]

327 IAC 12.1-2-7 --- Definitions: “contractor” defined

“Contractor” means:

(1) any:

- (A) person;
- (B) association;
- (C) partnership;
- (D) corporation;
- (E) business;
- (F) educational institution;
- (G) governmental body; or
- (H) other entity;

performing work under contract as an authorized representative of the department; and

(2) includes a subcontractor of the contractor and employees or officers of the contractor and subcontractor, which have been authorized by the department through the contract to have access to confidential information.

[As added at: 23 IR 1632.]

327 IAC 12.1-2-8 --- Definitions: “department” defined

“Department” means the department of environmental management.

[As added at: 23 IR 1632.]

327 IAC 12.1-2-9 --- Definitions: “effluent data” defined

(a) “Effluent data” means, with reference to any source of discharge of any pollutant, the following:

- (1) Information necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics, to the extent related to water quality, of any pollutant that has been discharged by the source, or of any pollutant resulting from any discharge from the source, or any combination of the foregoing.
- (2) Information necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics, to the extent related to water quality, of the pollutants that, under an applicable standard or limitation, the source was authorized to discharge, including, to the extent necessary for such purpose, a description of the manner or rate of operation of the source.

- (3) A general description of the location or nature, or both, of the source to the extent necessary to identify the source and to distinguish it from other sources, including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source.

(b) Notwithstanding subsection (a), the following information shall be considered to be effluent data only to the extent necessary to allow the department to disclose publicly that a source is or is not in compliance with an applicable standard or limitation, or to allow the department to demonstrate the feasibility, practicality, or attainability, or lack thereof, of an existing or proposed standard or limitation:

- (1) Information concerning research, or the results of research, on any product, method, device, or installation, or any component thereof, that was produced, developed, installed, and used only for research purposes.
- (2) Information concerning any product, method, device, or installation, or any component thereof, designed and intended to be marketed or used commercially but not yet so marketed or used.

[As added at: 23 IR 1632.]

327 IAC 12.1-2-10 -- Definitions: “information” defined

“Information” means any of the following, regardless of physical form or characteristics, without limitation:

- (1) Written or printed material.
- (2) Data processing card decks, printouts, and tapes.
- (3) Maps.
- (4) Charts.
- (5) Paintings.
- (6) Photographs.
- (7) Drawings.
- (8) Engravings.
- (9) Sketches.
- (10) Samples.
- (11) Working notes and papers.
- (12) Reproductions of such things by any means or process.

(13) Sound, voice, or electronic recordings in any form, in the possession of the department by which knowledge has been preserved and may be retrieved; and

- (14) Any other material.

[As added at: 23 IR 1632.]

327 IAC 12.1-2-11 -- Definitions: “person” defined

“Person” has the meaning set forth in IC 13-11-2-158(a).

[As added at: 23 IR 1632.]

327 IAC 12.1-2-12 -- Definitions: “pollutant” defined

“Pollutant” means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. The term does not mean the following:

- (1) Sewage from vessels or a discharge incidental to normal operation of a vessel of the Armed Forces as defined in Section 1322 of the Clean Water Act.

- (2) Water, gas, or other material that is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by Indiana only after determining that such injection or disposal will not result in the degradation of ground or surface water resources.

[As added at: 23 IR 1633.]

327 IAC 12.1-2-13 -- Definitions: “public record” defined

“Public record” has the meaning set forth in IC 5-14-3-2.

[As added at: 23 IR 1633.]

327 IAC 12.1-2-14 -- Definitions: “standard or limitation” defined

“Standard or limitation” means any:

- (1) prohibition;
- (2) effluent limitation; or
- (3) toxic, pretreatment, or new source performance standard;

established or publically proposed pursuant to the Clean Water Act or regulations under the Clean Water Act, including limitations or prohibitions in a permit issued or proposed by the department.

[As added at: 23 IR 1633.]

327 IAC 12.1-2-15 -- Definitions: “trade secret” defined

“Trade secret” has the meaning set forth in IC 24-2-3-2.

[As added at: 23 IR 1633.]

RULE 3. ACCESS TO PUBLIC RECORDS

327 IAC 12.1-3-1 --- Public records law: access to public records

(a) The provisions of IC 5-14-3 apply to all public records. All information received by the department is considered a public record.

(b) Public records are available to the public, except for any of the following public records:

- (1) Received under or supporting a claim of confidentiality.
- (2) Under review or appeal to determine if confidential under IC 5-14-3-4(a) or IC 5-14-3-4(b).
- (3) The commissioner has determined to be confidential under IC 5-14-3-4(a) or IC 5-14-3-4(b).

(c) Public records that are available to the public may be copied by the department upon payment of a fee provided for in IC 5-14-3-8. The fee shall be paid to the cashier’s office at the department.

[As added at: 23 IR 1633.]

RULE 4. CONFIDENTIALITY CLAIMS

327 IAC 12.1-4-1 --- Public records law: confidentiality claims

(a) A person submitting information to the department for which confidential treatment is requested shall make a written claim of confidentiality under subsections (c) and (d) at the time of submittal of the information.

(b) A person may request confidential treatment of information at the time the information is acquired through the actions of the department, such as inspections. The written claim for confidential treatment may be broad, but must be sufficiently clear to allow for accurate identification of the information claimed to be confidential. The supporting infor-

mation required under subsection (d) must be submitted to the commissioner within five (5) working days from the time the information claimed as confidential is acquired by the department.

(c) A person submitting a claim of confidentiality shall designate and segregate the information and the supporting information to which the claim applies in a manner that is sufficiently clear to allow the department to identify all confidential claim materials. One (1) of the following methods shall be used to indicate that the information and any of the supporting information under subsection (d) is claimed as confidential:

- (1) Attaching a cover sheet instructing which information is to be treated as confidential.
- (2) Marking each page or item of information as:
 - (A) confidential;
 - (B) confidential claim material;
 - (C) trade secrets; or
 - (D) confidential business information.

(d) The person submitting the claim shall provide supporting information to show that the information claimed as confidential is entitled to confidential treatment under IC 5-14-3, including the following:

- (1) State that the information is a specific type of confidential information under IC 5-14-3-4(a) and IC 13-14-11-3(a)(1) or IC 5-14-3-4(b) and IC 13-14-11-3(a)(2). If the information is confidential under IC 5-14-3-4(a)(4), the person submitting the claim shall provide a narrative statement or documents supporting the claim that the information meets the necessary elements of a trade secret as defined at IC 24-2-3-2.
- (2) State whether the information has previously been determined to be confidential by the commissioner.
- (3) Indicate the portion of the supporting information claimed as confidential as specified in subsection (c).
- (4) Specify the period of time for which confidentiality is requested if the period is to be other than seventy-five (75) years as provided in IC 5-14-3-4(e).
- (5) Whenever the claim is based on the commissioner's discretionary power to grant confidential status to information under IC 5-14-3-4(b) and IC 13-14-11-3(a)(2), state all of the following:
 - (A) The statute, rule, permit, or other authority that requires the submission of such information.
 - (B) Facts demonstrating that the information may be treated as confidential under IC 5-14-3-4(b).

(e) The information and supporting information claimed as confidential shall be treated as confidential until the commissioner makes a determination under 327 IAC 12.1-6-1.

[As added at: 23 IR 1633.]

RULE 5. TYPES OF CONFIDENTIAL INFORMATION

327 IAC 12.1-5-1 --- Public records law: information accessible by the public

In accordance with IC 5-14-3-4(a), the following types of information shall not be determined to be confidential:

- (1) Effluent data.
- (2) A standard or limitation.
- (3) Information that deals with the existence, absence, or level of contaminants in drinking water.

[As added at: 23 IR 1634.]

RULE 6. DETERMINATIONS ON CLAIM OF CONFIDENTIALITY**327 IAC 12.1-6-1 --- Public records law: determinations**

The commissioner shall make a determination on a claim of confidentiality submitted after the effective date of this article in accordance with this article. The determination shall be made in accordance with IC 5-14-3-4 and IC 13-14-11.

[As added at: 23 IR 1634.]

327 IAC 12.1-6-2 --- Public records law: request for additional supporting information

(a) The commissioner may request additional supporting information regarding a claim of confidentiality. Any additional supporting information claimed as confidential shall be treated as confidential until the commissioner makes a determination as required by section 1 of this rule.

(b) If the commissioner intends to make a determination to deny a claim of confidentiality, the commissioner shall notify the person in writing by certified mail, with return receipt requested, stating the following:

- (1) Additional supporting information must be submitted in accordance with 327 IAC 12.1-4-1(c).
- (2) The person has fifteen (15) days from the date of receipt of the notice to respond.
- (3) A submission shall be completed in the time frames and by the methods specified by IC 4-21.5-3-1(f). The person shall notify the department by telephone or facsimile within the fifteen (15) day period under subdivision (2) that additional supporting information has been mailed or deposited with a private carrier.
- (4) Failure to submit any additional supporting information within fifteen (15) days under subdivision (2) or within the time allowed under subsection (d) to provide additional information in support of the claim, will result in a determination based on the information and any supporting information already received.
- (5) Any additional supporting information claimed as confidential shall be treated as confidential until the commissioner makes a determination as required by section 1 of this rule.

(c) The commissioner shall make a determination after receipt of the additional supporting information submitted under subsection (b). The commissioner shall notify the person under subsection (b) of the intent to deny a claim of confidentiality only once before making a determination under section 3 or 4 of this rule. If the person fails to submit additional supporting information in accordance with subsection (b), the commissioner will make a determination based on the information and any supporting information already received.

(d) The commissioner may approve an extension of time for submitting additional supporting information if the person makes a request in writing within the fifteen (15) days allowed in subsections [subsection] (b)(2) and (b)(3). The extension will not exceed fifteen (15) days.

[As added at: 23 IR 1634.]

327 IAC 12.1-6-3 --- Public records law: approval determination

(a) If the commissioner determines that the information shall be held confidential for the full period requested by the person who made the claim under 327 IAC 12.1-4-1(d), the commissioner shall do all of the following:

- (1) Notify the person in writing of the determination.
- (2) Maintain the information as confidential for the period requested under 327 IAC 12.1-4-1(d) unless ordered by a court of competent jurisdiction to permit access to the information for inspection and copying.

(b) If the commissioner determines that the information is confidential but the period of confidential treatment shall be shorter than that requested by the person under 327 IAC 12.1-4-1(d), the commissioner shall notify the person in writing by certified mail, with return receipt requested stating the following:

- (1) The basis for the determination.
- (2) The period of time of confidentiality, after which the information will be available to the public.
- (3) The right to appeal the commissioner's determination.
- (4) The procedure for appealing the commissioner's determination, including the time period provided by IC 4-21.5.

[As added at: 23 IR 1635.]

327 IAC 12.1-6-4 --- Public records law: denial of claim

If the commissioner determines that the information is not confidential based on 327 IAC 12.1-4, the commissioner shall notify the person who submitted the claim of such determination. The notice shall be in writing, sent certified mail, with return receipt requested, and shall state the following:

- (1) The basis for the determination.
- (2) Notice that the person may appeal the commissioner's determination.
- (3) The procedure for appealing the commissioner's determination, including the time period provided by IC 4-21.5.
- (4) Notice that if the determination is timely appealed, the information shall be treated as confidential until the petition for review is denied or the commissioner is ordered not to treat the information as confidential.
- (5) Notice that unless the person timely appeals the determination, the information shall be made available to the public.

[As added at: 23 IR 1635.]

327 IAC 12.1-6-5 --- Public records law: modification of determinations

(a) The commissioner's determination that information is confidential shall continue in effect for the period of time specified in the determination under section 3 of this rule unless the commissioner issues a revised determination stating that the determination under section 1 of this rule no longer accurately describes the information's confidentiality due to any of the following:

- (1) Change in applicable law.
- (2) Newly-discovered or changed facts.
- (3) A clearly erroneous previous determination.

(b) If the commissioner concludes that such a determination under section 1 of this rule is of questionable validity, the commissioner shall do the following:

- (1) Inform the person in writing by certified mail with return receipt requested.
- (2) Afford the person an opportunity to furnish additional information on pertinent issues on the matter in accordance with sections 2(b)(1) through 2(b)(5) and section 2(d) of this rule.

(c) After consideration of any information timely submitted under subsection (b)(2), the commissioner may make either of the following determinations:

- (1) The information is not confidential.
- (2) The period of entitlement to treatment as confidential information shall end at an earlier date than determined under section 1 of this rule.

(d) After the determination provided for in subsection (c) is made, the commissioner shall notify the person in writing by certified mail with return receipt requested stating one (1) of the following:

- (1) That the claim of confidentiality has been approved as provided for in section 3 of this rule.
- (2) That the claim of confidentiality has been denied as provided for in section 4 of this rule.

[As added at: 23 IR 1635.]

RULE 7. APPEALS

327 IAC 12.1-7-1 --- Public records law: administrative appeal

An appeal of a determination shall be:

- (1) in accordance with IC 4-21.5-3 and rules of the office of environmental adjudication; and
- (2) made by filing a written petition for review with the office of environmental adjudication in accordance with IC 4-21.5-3.

A copy of the petition shall be served on the commissioner concurrent with such filing.

[As added at: 23 IR 1636.]

327 IAC 12.1-7-2 --- Public records law: judicial review

Judicial review of a final order of the environmental law judge shall be in accordance with IC 4-21.5-5.

[As added at: 23 IR 1636.]

RULE 8. AUTHORIZED DISCLOSURE OF CONFIDENTIAL INFORMATION

327 IAC 12.1-8-1 --- Public records law: authorized disclosure of confidential information

Confidential information may be disclosed by the department only in accordance with IC 13-14-11-6.

[As added at: 23 IR 1636.]

RULE 9. WRONGFUL DISCLOSURE PENALTIES

327 IAC 12.1-9-1 --- Public records law: wrongful disclosure penalties

Penalties for wrongful disclosure of confidential information are contained in IC 5-14-3-10.

[As added at: 23 IR 1636.]

RULE 10. CONFIDENTIALITY AGREEMENTS

327 IAC 12.1-10-1 -- Public records law: confidentiality agreements

(a) Persons employed, contracted, or subcontracted by the department, prior to accessing or being granted access to confidential information, must execute a confidentiality agreement enforceable by:

- (1) the state; and
- (2) the submitter of the information.

(b) The following is the confidentiality agreement form for state employees:

**CONFIDENTIALITY AGREEMENT
FOR STATE EMPLOYEES**

I understand that I will have access to certain confidential information submitted to the Indiana Department of Environmental Management pursuant to state or federal statute

or rule. This access has been granted in accordance with my official duties as an employee of the state of Indiana.

I understand that confidential information may not be disclosed except as authorized by rules of the board as contained in 327 IAC 12.1. My obligation not to disclose such confidential information includes disclosure to any other employee, officer, or authorized representative of the state or of the United States unless such employee, officer, or authorized representative is concerned with carrying out or implementing IC 13 or when the information is relevant in any proceeding related to enforcement.

I understand that, under Indiana statute IC 5-14-3-10, I am liable for a possible fine of up to five thousand dollars (\$5,000) or imprisonment for up to one year, or both, if I knowingly or intentionally disclose confidential information to any person not authorized to receive it.

I understand that I may be subject to disciplinary action for violation of this agreement with penalties up to and including dismissal.

I understand that this agreement is enforceable by the state of Indiana and by the person who submits confidential information.

I agree that I will treat any confidential information furnished to me as confidential as established by the department.

(Signature) _____

Name (Typed) _____ Date _____

Name (Typed)

Date _____

(c) The following is the confidentiality agreement form for employees or officers of contractors:

CONFIDENTIALITY AGREEMENT
FOR CONTRACTED EMPLOYEE OR OFFICER

I understand that as an employee or officer of _____, a contractor performing work for the Indiana Department of Environmental Management, I will have access to certain confidential information. This access has been granted to me in order that I can perform my work under the contract.

I understand that such confidential information may not be disclosed by me except as authorized by a state or federal statute or rule. My obligation not to disclose such confidential information includes disclosure to any employee of the Indiana Department of Environmental Management, any employee or officer of any contractor, or any subcontractor unless such employee or officer has executed a confidentiality agreement.

I understand that, under Indiana statute IC 5-14-3-10, I am liable for a possible fine of up to five thousand dollars (\$5,000) or imprisonment for up to one year, or both, if I knowingly or intentionally disclose confidential information to any person not authorized to receive it. In addition, I understand that I may be subject to disciplinary action for violation of this agreement up to and including dismissal.

I understand that this agreement is enforceable by the state of Indiana and by the person who submits confidential information.

I agree that I will treat any confidential information furnished to me as confidential as established by the department.

(Signature) _____
Name (Typed) _____ Date _____

Name (Typed)

Date _____

[As added at: 23 IR 1636.]

